BADIADDIN MOHD MAHIDIN & ANOR

v.

ARAB MALAYSIAN FINANCE BHD

FEDERAL COURT, KUALA LUMPUR
EUSOFF CHIN CJ
MOHD AZMI FCJ
PEH SWEE CHIN FCJ
WAN ADNAN ISMAIL FCJ
GOPAL SRI RAM JCA
[CIVIL APPEAL NO: 02-4-1996(N)]
5 JANUARY 1998

CIVIL PROCEDURE: *Jurisdiction - High Court - Whether one High Court has jurisdiction to set aside a final order of another High Court*

CIVIL PROCEDURE: *Appeal - Whether Court of Appeal correct in ruling that court was functus officio after making judgment - Whether one court can set aside a perfected judgment of another court of concurrent jurisdiction - Whether court could grant order of sale after charge and first order decreed invalid*

CONTRACT: *Privity - Whether appellants not being parties to contract liable to repay respondent - Whether appellants had received benefit - Whether loan agreement valid - Whether third party charge void - Contracts Act 1950, s. 66*

LAND LAW: *Malay reservations - Charge - Whether invalid - Whether order of sale invalid - Section 13 of Malay Reservations Enactment*

WORDS & PHRASES: *"Any person"- Contracts Act 1950, s. 66*

The appellants were the registered co-owners of a piece of Malay reservation land ('the land') in Tampin. Their business associate, one Ismail Omar ('Ismail'), was in need of a loan and to furnish security for the personal loan, the appellants assisted Ismail by charging the land to the respondent. After the loan was disbursed, Ismail committed a breach of the loan agreement and the respondent foreclosed the third party security and obtained an order for sale of the property. The appellants successfully applied to have the charge and the order for sale declared null and void on the ground that they were in violation of the prohibition imposed by s. 13 of the Malay Reservations Enactment ('the Enactment'). The respondent then filed an application before the same judge for a declaration that the appellants, having received a benefit

from the respondent pursuant to s. 66 of the Contracts Act 1950 ('the Act'), were liable to repay the outstanding amount owing to the respondent. An order for sale was granted on 8 October 1990 ('the second order'), notwithstanding the invalidity of the charge and the first order for sale as decreed by the judge himself earlier.

The appellants subsequently applied and obtained an order dated 22 September 1995 setting aside the second order on the basis that they were entitled to the remedy *ex debito justitiae*. The respondent appealed to the Court of Appeal which allowed the appeal on the ground that the High court was *functus officio* and thus had no jurisdiction to set aside the second order irrespective of any illegality in it. The appellants appealed to the Federal Court.

The issues before the court were: (i) whether the first and second orders or any part thereof were invalid because they were made in contravention of s. 13 of the Enactment; (ii) whether one High Court has the jurisdiction to set aside a final order regularly obtained from another High Court of concurrent jurisdiction; and (iii) whether s. 66 of the Act could be invoked against the appellants.

Held:
Per Mohd Azmi FCJ

[1] It is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. The one special exception to this rule is where the final judgment of the High Court can be proved to be null and void on the ground of illegality or lack of jurisdiction. Apart from the breach of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened any written law, the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on the ground of illegality or lack of jurisdiction. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases, where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice.

[1a] The Court of Appeal, in allowing the respondent's appeal, had failed to appreciate the central argument on the availability of the inherent jurisdiction of the High Court to exercise its discretion to set aside the illegal attempt by the respondent to subvert and effectively reverse the original, final and perfectly legitimate order of the High Court, as a special exception to the doctrine governing the finality of court orders, notwithstanding the absence of any appeal. The learned judges had failed to direct their minds to the fundamental issue of whether the appellants' application came within the category of cases that attracted *ex debito justitiae*. The second order for sale of the land, which had the effect of an attachment in execution of a judgment, was null and void being in violation of the prohibition imposed by s. 13 of the Enactment. Thus, that order being in violation of a statutory prohibition, it followed that the High court should have the inherent jurisdiction to set aside the second illegal order on the basis of the *ex debito justitiae* principle.

[2] Section 66 of the Act does not create a cause of action. It confers a discretionary remedy in the nature of restitution to be exercised by the court within the ambit of the section and within the principles of the law of contract. Under s. 66 of the Act, the party who is bound to restore any advantage received or to make compensation for such advantage should be construed as "any person" who is a party to the agreement and who has received any advantage pursuant to the terms or conditions of the invalid contract. To extend the meaning of "any person" in s. 66 of the Act to strangers to the agreement will be in violation of the elementary principles of contract.

[2a] From the loan agreement and the charge documents, the appellants were not beneficiaries of the loan. The appellants were also not parties to the loan agreement, and s. 66 of the Act could not be invoked against them. The court thus had no jurisdiction to order the appellants to pay under s. 66 of the Act. The fact that the appellants were paid from the loan given by the respondent could not make them parties or privies to the contract so as to enable the court to bring them within the ambit of s. 66 of the Act. The loan agreement was perfectly valid and enforceable by law. Applying the principle of severability, the effect of the illegal charge was merely to downgrade the borrowing of the loan from a secured to an unsecured loan. What was discovered to be void was the charge transaction between the appellants and the respondent, and as third party chargors, the appellants did not receive any benefit within the meaning of s. 66 of the Act, either under the charge or the loan agreement. In the circumstances, the second order by the High Court

under s. 66 of the Act was invalid as it was made without, or in excess of jurisdiction. Since the judgment under s. 66 of the Act was invalid, it followed that the order for sale of the appellants' land to satisfy the said judgment should fall to the gound, apart from it being in violation of the prohibition imposed by s. 13 of the Enactment.

Per Peh Swee Chin FCJ

[1] The doctrine of *res judicata* would apply to bar the making of the third order of 22 September 1995 ('the third order') directly concerned, because the second order of 8 October 1990 had become the truth between the landowners and the chargee, and the third order would constitute a challenge to the truth or accuracy of the second order. The High Court should have exercised its inherent jurisdiction and dismissed the fresh subsequent proceeding in which the third order was made, by relying on the doctrine of *res judicata* even though it was not pleaded by any of the parties.

[2] When a judgment in the High court has been perfected, a party to the judgment generally, and subject to the same passage or any written law, and apart from any appeal, cannot re-open the matter finalised in the judgment by seeking to alter it or amend it for the court would be *functus officio*, by virtue of the ratio of *Hock Hua Bank v. Sahari Murid*. Once perfected, a judgment of the High Court is also entitled to the obedience and respect from the parties to it on the basis of a command from a superior court of unlimited civil jurisdiction in the course of contentious litigation. It is also long established that one can apply to set aside an order of a superior court only in direct proceedings filed for the very purpose of having it set side on valid grounds, but without doing so, one cannot attack its invalidity laterally by raising an objection to its invalidity in any other proceedings, without filing proceedings for applying to have it set aside first. When one wishes to file such proceedings to so set it aside, one must do so within the same proceedings or action in which the same order was obtained and not in a separate fresh proceeding or new action on any ground other than those mentioned in *Hock Hua Bank v. Sahari Murid*.

[3] Illegality affects a contract in the way that it nullifies the consideration or object of the contract and is available as a defence to an action based upon such a contract. If a party complains of an illegality in a contract, he must plead it or the court itself takes judicial notice of it when the contract is *ex facie* illegal or evidence about it emerges in court. All these must have taken place either at the trial of the first instance, or

in any direct appeal to a higher court therefrom. The court, if it does not deal with the illegality in any way aforesaid, will be *functus officio* and cannot take the point after a judgment is perfected. A point of illegality cannot be reserved by a litigant for future use without deploying it at the trial or in an appeal therefrom. A court cannot outside the scope of such trial and such appeal therefrom, at anytime therafter take judicial notice of such point pleaded as an afterthought in a later action filed also as an afterthought. The doctrine of *res judicata*, being based on the policy of interest *rei publicae ut finis litium*, will prevent these afterthoughts.

[4] The second order of sale was in substance and in truth the same as the order of sale of the land which was set aside by the same court in the same originating summons. The second order of sale was a resuscitation of the order of sale of the land under the thinnest disguise which the same court had set aside earlier by its judgment of 21 March 1988. The resuscitation thus had the effect of invalidating or subverting the judgment of 21 March 1988, which was given on account of the Enanctment after hearing arguments and from which none of the parties had appealed.

[4a] The second order should not be re-opened and heard again after it was perfected and also on the ground of *res judicata*, but it should not be set aside as the clear ratio in *Hock Hua Bank* would be departed from, even though it would be done on grounds of illegality on the argument based on the Enactment. However the second order could be stayed permanently. The second order was an order of execution but stated in the form of and as part of a court's order. The court which makes an order since perfected is *functus officio* about re-opening the matter and rehearing the parties on merits about the order, but it is not *functus officio* to hear a subsequent application to set aside an order of execution or order of seizure and sale. The appellants would have been perfectly in order to set aside such an order of execution but for the fact that the said order of execution which was made, was part of a perfected court's order. If the court could not grant an order outright, in the form of setting aside the said order of execution because it was part of a perfected order and also because it was *res judicata*, then the court could still grant a relief or order which could be consistent with the prayer sought by the second originating summons. The court has the inherent jurisdiction to stay any proceeding (which includes an order of execution) which is an abuse of process. The second order was for the resuscitation of the earlier order of sale which was a misuse of the

court's machinery and was therefore an abuse of process. Therefore the appeal was allowed and the order of the Court of Appeal set aside. A further order was made that the third order be substituted with another order to the effect that execution of the second order be stayed permanently without any right of removal of such stay.

Obiter dictum

[1] The grounds for setting aside a consent judgment are grounds which relate to *consensus ad idem* or the free consent of parties to a binding agreement or contract. If it is proved that there are grounds which vitiate such free consent, the agreement is not binding. If the agreement upon which a consent order or judgment by consent is based, is vitiated by any ground recognised in equity as vitiating such free consent, such as fraud, mistake, total failure of consideration, then such a perfected consent order or judgment by consent may be set aside in a fresh action filed for the purpose. Grounds which may vitiate such free consent should also include misrepresentation, coercion and undue influence, and other grounds in equity.

Per Gopal Sri Ram JCA

[1] As a general rule orders of a court of unlimited jurisdiction may not be impugned on the ground that they are void in the sense that they may be ignored or disobeyed. It is well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. So long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is entirely open to the court upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal. It is clear that in the light of the principles established, that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law. The ends of justice will not be met if such a power does not exist; and the procedural branch of the broad and flexible doctrine of estoppel known as *res judicata* finds no place in such a circumstance. Neither has the *functus officio* theory, which upon close examination is merely part and parcel of the doctrine of *res judicata*, any role to play in the case.

[2] The charge that the appellants had created over the land became void, in consequence of a breach of the Enactment. With it fell the annexure that contained the contract between the appellants and the respondent. The loan contract continued to be perfectly valid since it did not offend the provisions of the Enactment. The appellants were not parties to the loan agreement. Neither did they receive any benefit under the annexure to the charge. The benefit of which s. 66 of the Act speaks is one that is received under the very contract which is discovered to be void. The benefit in question under the contract of loan neither became void nor was discovered to be void. The contract that was void was the annexure to the charge and the appellants did not receive any benefit under it.

[2a] The words "or any other person" appearing in s. 2(d) of the Act are not wide enough to exclude the doctrine of privity of contract. It follows that the identical words "any person" used by s. 66 of the Act do not include persons who are not parties to a contract under which a benefit passes. There is no justification in principle or policy to extend the terms of the section by means of an interpretation that runs counter to settled jurisprudence. It follows that only parties to a contract may claim or become liable to make restitution under that section. Accordingly, the words "any person" appearing in s. 66 of the Act must refer only to parties to the original contract that either becomes or is discovered to be void.

[2b] The first order did not in any way infringe the provisions of the Enactment. There is nothing in the Enactment that prohibits the making of an order for restitution of moneys advanced upon the strength of a void security. The second order directed the sale of the land in contravention of s. 13 of the Enactment. As there is no power in a court to make an order in breach of the provisions of written law, the second order was illegal and utterly void. The Court of Appeal was wrong in deciding the appeal to it purely on the basis that the judge was *functus officio*. Thus the appeal should be allowed with costs both here and in the court below. The order of the Court of Appeal was set aside and the orders made by the judge at first instance were restored.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Perayu-perayu adalah tuanpunya bersama yang berdaftar bagi sebidang tanah rizab Melayu di Tampin. Rakan sekutu perniagaan mereka, seorang yang bernama Ismail bin Omar memerlukan satu pinjaman dan untuk memberikan jaminan bagi pinjaman persendirian itu, perayu-perayu telah membantu Ismail dengan menggadaikan tanah mereka kepada responden. Selepas pinjaman itu dibelanjakan, Ismail telah melakukan kemungkiran terhadap perjanjian pinjaman tersebut dan responden-responden telah menghalang-tebus jaminan pihak ketiga dan mendapatkan perintah jualan bagi hartanah tersebut. Tuan-tuan punya tanah itu telah dengan jayanya memohon supaya gadaian dan perintah jualan tersebut diisytiharkan batal dan tak sah atas alasan bahawa mereka melanggari larangan yang dikenakan oleh s. 13 Enakmen Rizab Melayu ('Enakmen tersebut'). Responden-responden kemudiannya telah memfailkan satu permohonan di hadapan hakim yang sama untuk mendapatkan satu pengisytiharan bahawa perayu-perayu, setelah menerima kemanfaatan daripada responden adalah dengan s. 66 Akta Kontrak 1950 ('Akta tersebut'), bertanggungan untuk membayar balik jumlah yang masih belum jelas yang terhutang kepada responden. Satu perintah jualan telah diberikan pada 8 Oktober 1990 (perintah kedua), meskipun terdapatnya ketaksahan gadaian dan perintah pertama tersebut sepertimana yang didekrikan oleh Yang Arif sendiri pada awalnya.

Perayu-perayu kemudiannya telah memohon dan mendapatkan perintah bertarikh 22 September 1995 yang mengenepikan perintah kedua tersebut atas dasar bahawa mereka berhak kepada remedi *ex debito justitiae*. Responden telah memohon kepada Mahkamah Rayuan yang telah membenarkan rayuan tersebut atas alasan bahawa Mahkamah Tinggi adalah *functus officio* dan dengan itu tidak mempunyai bidangkuasa untuk mengenepikan perintah kedua tanpa menghiraukan mengenai sebarang tindakan yang menyalahi undang-undang dalam perintah tersebut. Perayu-perayu telah merayu kepada Mahkamah Persekutuan.

Isu-isu yang terdapat di hadapan mahkamah adalah: (i) samada perintah pertama dan kedua atau mana-mana bahagian daripadanya adalah tak sah kerana telah dibuat dalam melanggari s. 13 Enakmen tersebut; (ii) samada sesuatu Mahkamah Tinggi mempunyai bidangkuasa untuk mengenepikan perintah muktamad yang telah diperolehi menurut aturan daripada sebuah Mahkamah Tinggi lain yang mempunyai bidangkuasa bersama; dan (iii) samada s. 66 Akta Kontrak 1950 boleh digunakan terhadap perayu-perayu.

Diputuskan:
Oleh Mohd Azmi HMP

[1] Ianya merupakan undang-undang yang telah ditetapkan bahawa sesebuah Mahkamah Tinggi tidak boleh mengenepikan perintah muktamad yang telah diperolehi menurut aturan daripada sebuah Mahkamah Tinggi lain yang mempunyai bidangkuasa bersama. Tetapi satu kekecualian kepada kaedah ini adalah di mana penghakiman muktamad Mahkamah Tinggi boleh dibuktikan sebagai batal dan tak sah atas alasan kepenyalahan undang-undang atau ketiadaan bidangkuasa. Selain daripada kemungkiran keadilan asasi, dalam sebarang percubaan untuk memperluaskan lingkungan bidangkuasa budibicara dan bidangkuasa sedia ada mahkamah-mahkamah atasan untuk mengenepikan sesuatu perintah mahkamah *ex debito justitiae*, kepada kategori kes-kes yang melibatkan perintah-perintah yang melanggari mana-mana undang-undang bertulis, perlanggaran tersebut seharusnya merupakan sesuatu yang menentang larangan berkanun yang substantif supaya menjadikan perintah yang tidak sempurna itu tidak sah dan batal atas alasan ketiadaan bidangkuasa atau tindakan salah di sisi undang-undang. Budibicara untuk menggunakan bidangkuasa sedia ada seharusnya juga dilaksanakan secara kehakiman dalam kes-kes yang terkecuali, di mana ketidak-sempurnaan teramat serius hingga wujudnya keperluan untuk mengenepikan perintah yang tidak sempurna itu bagi memboleh mahkamah melakukan keadilan.

[1a] Mahkamah Rayuan dalam membenarkan rayuan responden, telah gagal menghargai, bahawa penghujahan utama mengenai ketersediaan bidangkuasa sedia ada Mahkamah Tinggi untuk melaksanakan budibicaranya bagi mengenepikan percubaan yang tidak sah di sisi undang-undang oleh responden, untuk menggagalkan dan secara berkesannya mengakaskan perintah Mahkamah Tinggi yang sesungguhnya sah, asal dan muktamad, sebagai kekecualian khas kepada doktrin yang menguasai kemuktamadan perintah-perintah mahkamah, tanpa menghiraukan ketiadaan mana-mana rayuan. Hakim-hakim yang bijaksana telah gagal untuk mengarahkan pemikiran mereka kepada isu-isu asas mengenai samada permohonan perayu-perayu terlingkung dalam kategori kes-kes yang menarik *ex debito justitiae*. Perintah kedua mengenai penjualan tanah rizab itu, yang mana mempunyai kesan sebagai suatu penahanan dalam perlaksaan sesuatu penghakiman, adalah tak sah dan batal dalam melanggari larangan yang dikenakan oleh s. 13 Enakmen tersebut. Dengan itu perintah tersebut yang melanggari suatu larangan berkanun, dimaksudkan bahawa Mahkamah Tinggi seharusnya mempunyai bidangkuasa sedia ada untuk mengenepikan perintah tak sah yang kedua atas dasar prinsip *ex debito justitiae*.

[2] Seksyen 66 Akta Kontrak tersebut, tidak mewujudkan suatu kausa tindakan. Ianya memberikan remedi budibicara menurut sifat restitusi untuk dilaksanakan oleh mahkamah dalam lingkungan seksyen tersebut dan dalam prinsip undang-undang kontrak. Di bawah s. 66 Akta tersebut, pihak yang terpaksa mengekalkan sebarang kemanfaatan yang diterima atau membuat bayaran pampasan untuk kemanfaatan yang sedemikian seharusnya ditafsirkan sebagai "mana-mana orang" yang merupakan satu pihak kepada perjanjian tersebut dan telah menerima sebarang kemanfaatan selaras dengan terma-terma atau syarat-syarat kontrak yang tak sah itu. Bagi melanjutkan maksud "mana-mana orang" dalam s. 66 sehingga membabitkan orang-orang yang tidak dikenali, yang bukannya merupakan satu pihak kepada perjanjian itu adalah melakukan perlanggaran prinsip asas kontrak tersebut.

[2a] Berdasarkan perjanjian pinjaman dan dokumen-dokumen gadaian, perayu-perayu bukannya merupakan benefisiari-benefisiari pinjaman tersebut. Perayu-perayu juga bukannya merupakan pihak kepada perjanjian pinjaman tersebut dan s. 66 Akta tersebut tidak boleh digunakan terhadap mereka. Mahkamah dengan itu tidak mempunyai bidangkuasa untuk memerintahkan perayu-perayu supaya membayar di bawah s. 66 Akta tersebut. Fakta bahawa perayu-perayu dibayar daripada pinjaman yang telah diberikan oleh responden tidak boleh menjadikan mereka pihak-pihak atau privi kepada kontrak tersebut bagi membolehkan mahkamah merangkuminya dalam lingkungan s. 66 Akta tersebut. Perjanjian pinjaman tersebut adalah sesungguhnya sah dan boleh dikuatkuasakan menurut undang-undang. Dalam memakai prinsip boleh asing, kesan gadaian tak sah itu adalah semata-mata untuk menurutkan taraf peminjaman pinjaman tersebut daripada pinjaman bercagar kepada pinjaman tidak bercagar. Apa yang didapati sebagai tak sah atau batal adalah transaksi gadaian antara perayu-perayu dan responden, dan sebagai penggadai pihak ketiga, perayu-perayu tidak menerima sebarang kemanfaatan dalam lingkungan maksud s. 66 Akta tersebut, sama ada di bawah gadaian atau perjanjian pinjaman tersebut. Dalam keadaan itu, perintah oleh Mahkamah Tinggi di bawah s. 66 Akta tersebut adalah tak sah kerana ianya dibuat tanpa atau melampaui bidangkuasa. Oleh kerana penghakiman di bawah s. 66 Akta tersebut adalah tak sah, di dapati bahawa perintah jualan tanah perayu untuk memenuhi penghakiman tersebut seharusnya dibatalkan, selain daripada ianya melanggari larangan yang dikenakan oleh s. 13 Enakmen tersebut.

Oleh Peh Swee Chin HMP

[1] Doktrin *res judicata* akan terpakai bagi menghalang pembuatan perintah ketiga bertarikh 22 September 1995 ('perintah ke-3') yang berkaitan secara langsungnya, kerana perintah ke-2 bertarikh 8 Oktober 1990 ('perintah ke-2') telah menjadi kebenaran antara tuan-tuan tanah dan pemegang gadaian, dan perintah ke-3 akan membentuk satu cabaran kepada kebenaran atau ketepatan perintah ke-2 itu. Mahkamah Tinggi seharusnya telah melaksanakan bidangkuasa sedia adanya dan menolak prosiding baru yang berikutnya dalam mana perintah ke-3 itu dibuat, dengan bergantung pada doktrin *res judicata* walaupun ianya tidak diplidkan oleh mana-mana pihak.

[2] Apabila sesuatu penghakiman dalam Mahkamah Tinggi telah disempurnakan, sesuatu pihak kepada penghakiman itu secara amnya dan tertakluk kepada rangkap yang sama atau mana-mana undang-undang bertulis, dan selain daripada mana-mana rayuan, tidak boleh membuka semula perkara yang dimuktamadkan dalam penghakiman itu dengan berusaha untuk mengubahkannya atau memindanya bagi mahkamah atau adalah *functus officio,* menurut nisbah *Hock Hua Bank v. Sahari Murid.* Sebaik sahaja disempurnakan, sesuatu penghakiman Mahkamah Tinggi adalah juga harus dipatuhi dan dihormati oleh pihak-pihak kepadanya atas dasar bahawa ianya adalah suatu perintah daripada sebuah Mahkamah atasan yang mempunyai bidangkuasa sivil yang tidak terhad dalam perjalanan litigasi bertikaian. Adalah juga lama ditetapkan bahawa seseorang boleh memohon untuk mengenepikan sesuatu perintah mahkamah atasan hanya dalam prosiding langsung yang telah difailkan semata-mata bagi tujuan mengenepikannya atas alasan-alasan yang sah, tetapi dengan tidak melakukan sedemikian, seseorang tidak boleh mencabar kesahihannnya secara sepihak dengan membangkitkan suatu bantahan terhadap kesahihannya dalam mana-mana prosiding lain, tanpa memfailkan prosiding untuk memohon bagi mengenepikannya terdahulu. Apabila seseorang ingin untuk memfailkan prosiding yang sedemikian untuk mengenepikannya sedemikian rupa, seseorang mesti melakukannya dalam lingkungan prosiding atau tindakan yang sama dalam mana perintah yang sama telah diperolehi dan bukannya dalam satu prosiding berasingan yang baru atau tindakan baru atas mana-mana alasan yang lain daripada yang disebutkan dalam *Hock Hua Bank v. Sahari Murid.*

[3] Kepenyalahan undang-undang menjejaskan sesuatu kontrak dengan cara membatalkan pertimbangan atau tujuan sesuatu kontrak dan tersedia sebagai satu pembelaan kepada sesuatu tindakan berdasarkan kontrak yang sedemikian. Jika sesuatu pihak mengadu mengenai kepenyalahan

di sisi undang-undang dalam sesuatu kontrak, beliau mestilah memplidkannya dan mahkamah dengan sendirinya mengambil perhatian kehakiman mengenainya apabila kontrak itu adalah tidak sah di sisi undang-undang *ex facie* atau keterangan mengenainya berbangkit dalam mahkamah. Kesemua perkara-perkara ini semestinya telah berlaku samada di perbicaraan pada mulanya, atau dalam mana-mana rayuan secara langsung kepada mahkamah yang lebih tinggi bermula daripada situ. Mahkamah tersebut, jika ianya tidak menguruskan kepenyalahan undang-undang itu menurut mana-mana cara seperti yang tersebut di atas, akan menjadi *functus officio* dan tidak boleh membangkitkannya selepas sesuatu penghakiman telah disempurnakan. Sesuatu perkara kepenyalahan undang-undang tidak boleh diakaskan oleh litigan untuk digunakan di masa hadapan tanpa menggunakannya di perbicaraan atau dalam sesuatu rayuan bermula daripada situ. Sesebuah mahkamah tidak boleh di luar lingkungan perbicaraan yang sedemikian dan rayuan yang sedemkkian, bermula daripada situ, pada bila-bila masa selepas itu mengambil perhatian kehakiman mengenai perkara sedemikian yang telah diplidkan sebagai sesuatu yang difikirkan sedemikian dalam sesuatu tindakan kemudian yang difailkan juga sebagai sesuatu yang difikirkan kemudian. Doktrin *res judicata*, yang berasaskan dasar kepentingan *rei publicae ut finis litium*, akan menghalang perkara-perkara yang difikirikan kemudian ini.

[4] Perintah jualan ke-2 adalah menurut substans dan menurut kebenaran sama seperti perintah jualan tanah yang mana telah diketepikan oleh mahkamah yang sama dalam saman pemula yang sama. Perintah jualan ke-2 adalah merupakan tindakan menghidupkan semula perintah jualan tanah di bawah samaran yang paling jelas yang mana telah diketepikan oleh mahkamah yang sama pada awalnya melalui penghakimannya bertarikh 21 Mac 1988. Perbuatan menghidupkan semula itu dengan yang demikian mempunyai kesan mentaksahkan atau melemahkan penghakiman bertarikh 21 Mac 1988, yang mana telah diberikan menurut Enakmen selepas mendengar penghujahan-penghujahan dan daripada yang mana tidak satu pun daripada pihak-pihak yang berkenaan telah merayu.

[4a] Perintah ke-2 tersebut tidak seharusnya dipulihkan semula dan didengar sekali lagi selepas ianya disempurnakan dan juga atas alasan *res judicata*, tetapi ianya tidak seharusnya diketepikan sepertimana nisbah nyata dalam *Hock Hua Bank* akan diketepikan, walaupun ianya akan dilakukan atas alasan kepenyalahan undang-undang ke atas penghujahan tersebut berdasarkan Enakmen itu. Walaubagaimanapun perintah ke-2 itu boleh

ditangguhkan secara tetap. Perintah Ke-2 merupakan suatu perintah perlaksanaan tetapi telah dinyatakan dalam bentuk dan sebagai sebahagian daripada perintah mahkamah. Mahkamah yang membuat sesuatu perintah yang sejak itu telah disempurnakan adalah *functus officio* mengenai memulakan semula perkara itu dan mendengar semula pihak-pihak berdasarkan merit-merit mengenai perintah itu, tetapi ianya tidak *functus officio* untuk mendengar suatu permohonan yang berikutnya untuk mengenepikan satu perintah perlaksanaan atau perintah penyitaan dan jualan. Tuan-tuan punya tanah mungkin berada adalah keadaan yang amat sempurna untuk mengenepikan perintah perlaksanaan yang sedemikian melainkan bagi fakta bahawa perintah perlaksanaan tersebut yang mana telah dibuat, adalah merupakan sebahagian daripada perintah mahkamah yang telah disempurnakan. Jika mahkamah tidak boleh memberikan satu perintah secara langsung, dalam bentuk mengenepikan perintah perlaksanaan tersebut kerana ianya merupakan sebahagian daripada perintah yang telah disempurnakan dan juga kerana ianya adalah *res judicata*, maka mahkamah masih boleh memberikan satu relief atau perintah yang berkemungkinan konsisten dengan pohonan yang dipohon melalui saman pemula yang kedua. Mahkamah mempunyai bidangkuasa sedia ada untyuk menangguhkan sebarang prosiding (yang mana termasuk perintah perlaksanaan) yang mana adalah satu penyalahgunaan proses. Perintah ke-2 adalah bertujuan untuk menyelamatkan perintah jualan yang lebih awal yang mana merupakan salah gunaan jentera mahkamah dan dengan itu adalah suatu penyalahgunaan proses. Dengan itu rayuan telah dibenarkan dan perintah Mahkamah Rayuan diketepikan. Satu perintah yang selanjutnya dibuat bahawa perintah ke-3 digantikan dengan satu perintah yang lain supaya perlaksanbaan perintah ke-2 digantung dengan tetap tanpa sebarang hak untuk membatalkan penggantungan yang sedemikian.

Obiter dictum

[1] Alasan bagi mengenepikan sesuatu penghakiman persetujuan adalah alasan-alasan yang berkaitan dengan konsesus ad idem atau persetujuan bebas pihak-pihak kepada sesuatu perjanjian atau kontrak yang mengikat. Jika ianya terbukti bahawa terdapatnya alasan-alasan yang merosakkan persetujuan atau kebenaran yang bebas sedemikian, maka perjanjian itu tidak mengikat. Jika perjanjian ke atas yang mana sesuatu perintah persetujuan atau penghakiman melalui persetujuan diasaskan, telah dirosakkan oleh mana-mana alasan yang diiktirafkan dalam ekuiti sebagai merosakkan persetujuan bebas yang sedemikian, seperti fraud, kesilapan, kegagalan pertimbangan yang sesungguhnya, maka perintah persetujuan

yang disempurnakan itu atau penghakiman melalui persetujuan boleh diketepikan melalui tindakan baru yang telah difailkan bagi tujuan itu. Alasan-alasan yang akan merosakkan persetujuan bebas yang sedemikian seharusnya juga termasuk salah-nyataan, paksanaan dan pengaruh tidak wajar dan lain-lain alasan dalam ekuiti.

Oleh Gopal Sri Ram HMR

[1] Menurut kaedah umum, perintah-perintah mahkamah bidangkuasa yang tidak terhad mungkin tidak dipersoalkan atas alasan bahawa ianya batal dalam ertikata bahawa ianya mungkin tidak dipedulikan atau tidak dipatuhi. Ianya amat diketahui bahawa mahkamah-mahkamah bidangkuasa tidak terhadp juga tidak mempunyai kuasa untuk bertindak dalam melanggari undang-undang bertulis. Asalkan perintah mahkamah bidangkuasa tidak terhad kekal, sungguhpun ianya mungkin tidak teratur, ianya mesti dihormati. Tetapi di mana perintah mahkamah yang sedemikian dibuat dalam kemungkiran statut, ianya dibuat tanpa bidangkuasa dan dengan itu mungkin akan diisytiharkan tak sah dan diketepikan dalam prosiding-prosiding yang dimulakan bagi tujuan itu. Ianya sesungguhnya terbuka kepada mahkamah setelah kepenyalahan undang-undang itu dengan jelasnya ditunjukkan, untuk memberikan satu pengisytiharan bahawa perintah itu tak sah dan haruslah diketepikan. Ianya salah untuk mengandaikan bahawa perintah yang sedemikian akan hanya dibetulkan ketika rayuan. Ianya jelas bahawa memandangkan prinsip-prinsip yang tetap, bahawa sesuatu mahkamah bidangkuasa tidak terhad, walaupun dalam ketiadaan peruntukan nyata yang membolehkan, mempunyai kuasa sedia ada untuk mengenepikan perintah-perintahnya yang dibuat dalam kemungkiran undang-undang bertulis. Keputusan keadilan tidak akan dicapai jika kuasa yang sedemikian tidak wujud; dan cabang prosedur doktrin estopel yang luas dan mudah dilentur itu yang dikenali sebagai *res judicata* tidak terdapat dalam keadaan yang sedemikian. Teori *functus officio* tidak mempunyai, yang mana setelah diperiksa dengan telitinya adalah semata-mata merupakan sebahagian daripada doktrin *res judicata*, sebarang peranan dalam kes tersebut.

[2] Gadaian yang telah diwujudkan oleh perayu-perayu ke atas tanah itu menjadi batal, sekiranya berlaku kemungkiran Enakmen tersebut. Bersama-samanya juga terbatal lampiran yang mengandungi kontrak antara perayu-perayu dan responden. Kontrak pinjaman terus menjadi sah kerana ianya tidak mengganggui peruntukan-peruntukan Enakmen tersebut. Perayu-perayu bukannya merupakan pihak kepada perjanjian pinjaman tersebut. Mereka juga tidak menerima sebarang kemanfaatan

di bawah lampiran kepada gadaian tersebut. Kemanfaatan yang disebut oleh s. 66 Akta tersebut adalah yang diterima di bawah kontrak yang didapati terbatal. Kemanfaatan yang dipersoalan di bawah kontrak pinjaman tidak menjadi batal ataupun didapati sebagai batal. Kontrak yang batal dan tak sah adalah lampiran kepada gadaian tersebut dan perayu-perayu tidak menerima sebarang kemanfaatan di bawahnya.

[2a] Perkataan-perkataan "or any other person" yang terdapat dalam s. (2) Akta tersebut tidak begitu luas untuk mengeluarkan doktrin privity kontrak. Di dapati bahawa perkataan yang serupa "any person" yang telah digunakan oleh s. 66 Akta tersebut tidak termasuk orang-orang yang bukannya merupakan pihak-pihak kepada kontrak di bawah yang mana sesuatu kemanfaatan beredar. Tidak terdapat justifikasi pada prinsipnya atau dasar untuk melanjutkan terma-terma seksyen itu melalui suatu interpretasi yang seiringan dengan juriprudens yang tetap. Di dapati bahawa hanya pihak-pihak kepada sesuatu kontrakboleh menuntut atau menjadi bertanggungan untuk membuat, restitusi di bawah seksyen itu. Berikutan itu, perkataan "any person" yang terdapat dalam s. 66 Akta tersebut mestilah hanya merujuk kepada pihak-pihak kepada kontrak asal yang sama ada menjadi atau didapati tak sah.

[2b] Perintah pertama tidak dalam apa cara pun melanggari peruntukan-peruntukan Enakmen tersebut. Tidak terdapat apa-apa dalam Enakmen itu yang melarang pembuatan satu perintah untuk restitusi wang yang telah didahulukan berdasarkan kekuatan jaminan yang tak sah. Perintah yang kedua telah mengarahkan penjualan tanah yang melanggari s. 13 Enakmen tersebut. Oleh kerana tidak terdapat kuasa dalam sesebuah mahkamah untuk membuat satu perintah yang memungkiri peruntukan-peruntukan undang-undang bertulis, maka perintah kedua itu tak sah dan sememangnya batal. Mahkamah rayuan salah dalam memutuskan rayuan kepadanya semata-mata atas dasar bahawa hakim adalah *functus officio*. Dengan itu rayuan tersebut seharusnya dibenarkan dengan kos kedua-duanya di sini dan dalam mahkamah di bawah. Perintah Mahkamah Rayuan telah diketepikan dan perintah-perintah dibuat oleh hakim pertamanya hendaklah dipulihkan atau dikembalikan.

[Rayuan dibenarkan.]

Cases referred to:

Ainsworth v. Wilding [1896] 1 CH 673 ***(cit)***
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1955] 3 MLJ 189 ***(cit)***
Chief Kofi Forfie v. Barima Kwabena Seifah [1958] 1 All ER 289 ***(refd)***
Daimler Co Ltd v. Continental Tyre & Rubber Co (Great Britain) Ltd [1916] 2 AC 307
Devi Prasad v. Mehdi Hasan AIR [1940] Pat 81 ***(cit)***
Eu Finance Bhd v. Lim Yoke Foo [1982] 2 MLJ 37 ***(cit)***
Gendsingh v. Gowardhan AIR [1938] Nag 451 ***(cit)***
Giraj Baksh v. Kazi Hamid Ali [1886] ILR 9 All 340 ***(cit)***
Hj Hamid Ariffin & Anor v. Ahmad Mahmud [1976] 2 MLJ 79 ***(cit)***
Hock Hua Bank v. Sahari Murid [1981] 1 MLJ 143 ***(foll)***
Huddesfield Banking Co v. Henry Lister [1892] 2 Ch 273
Isaacs v. Robertson [1985] AC 97 ***(refd)***
Kepong Prospecting Ltd & Ors v. Schmidt [1968] 1 MLJ 170 ***(refd)***
Khaw Poh Chhuan v. Ng Gaik Peng & Ors [1966] MLJ 761
Kinch v. Walcott [1929] AC 482 ***(cit)***
Lawrence v. Lord Norreys [1890] 15 App Cas 210
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 ***(cit)***
Meenakshi Naidoo v. Subramaniya Sastri LR 14 IA 160 ***(refd)***
Metropolitan Bank v. Pooley [1885] 10 App Cas 210
Mui Bank Bhd v. Cheam Kim Yu (Beh Sai Ming, Intervenor) [1992] 2 MLJ 642 ***(cit)***
NKM Properties Sdn Bhd v. Rakyat First Merchant Bankers Bhd [1986] 1 MLJ 44 ***(cit)***
Overseas Chinese Banking Corp Ltd v. Simcloma Realty Sdn Bhd [1989] 1 MLJ 377 ***(cit)***
Pembenaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd [1991] 1 MLJ 100 ***(cit)***
Puah Bee Hong v. Pentadbir Tanah Daerah Wilayah Persekutuan [1994] 2 MLJ 601 ***(cit)***
Re Overseas Aviation Engineering (GB) Ltd [1962] 3 All ER 12 ***(refd)***
Re Shephard 43 Ch D 131
RMKRM v. Firm of MRMVL [1926] AC 761 ***(cit)***
Sajan Singh v. Sardara Ali [1960] MLJ 52
Scotch Leasing Sdn Bhd v. Chee Pok Choy [1977] 2 MLJ 105 FC ***(cit)***
Superintendent of Pudu Prison v. Sim Kie Chon [1986] 1 MLJ SC 494 ***(cit)***
Sykt Marak Jaya Sdn Bhd v. Sykt Masinda Sdn Bhd [1991] 2 MLJ 417 ***(cit)***
Wright v. Redgrave [1879] 11 Ch D 24

Legislation referred to:

Contracts Act 1950, ss. 2(d), 14, 66
Malay Reservations Enactment 1933, ss. 8(i), (ii), 13, 16, 17
National Land Code 1965, ss. 17, 260, 263

[Appeal from Court of Appeal, Kuala Lumpur; Civil Appeal No: N-02-679-95]

For the appellants - V Ganesalingam; M/s Krishna & Assoc
For the respondent - JW Appukuttan; M/s Kitson Foong & Assoc

Reported by Michele Saw

JUDGMENT

Mohd Azmi FCJ:

The historical and factual background leading to this appeal has been fully supplied in the other judgments of my learned brothers which I have had the opportunity to read in draft. Suffice it is to state that the appellants at all relevant times were the registered co-owners of a piece of Malay reservation land in Tampin. When their business associate, one Ismail bin Omar was in need of a loan of RM400,000, he was required by the respondent finance company (hereinafter referred to as 'the respondent' or 'the respondent/chargee') to furnish security for the personal loan. To assist Ismail, the appellants charged their land to the respondent. After the loan was approved and disbursed, Ismail committed a breach of the loan agreement, and whereupon the respondent in the normal course of financing business, foreclosed the third party security and obtained an order of sale of the property under the National Land Code. To cut the story short, it was then discovered that the third party charge on the Malay reservation land was null and void as at all material times the respondent was never specified a "Malay" under s. 17 read together with the Second Schedule to the Malay Reservations Enactment, and as such the dealing in the said land was illegal. Consequently, on the application of the appellants/chargors, Mustapha Hussain J granted an order dated 21 March 1988 (the March 1988 order) the relevant part of which declared the charge of the appellants' reserve land and as well as the order of foreclosure by the Land Administrator invalid. The illegality of the charge and the order of sale seem obvious enough, and understandably the respondent/chargee did not even care to appeal, but from subsequent events it is fair to assume that the respondent must have received legal advice to seek redress against the appellants/chargors under the provision of s. 66 of the Contracts Act 1950, as a way out of its predicament, consequent upon the secured loan becoming unsecured as a result of the third party charge being declared null and void. Hence on the respondent's application before the same judge, an order was obtained dated 8 October 1990 (the October 1990 order) declaring that the appellants/chargors had received an advantage or benefit from the respondent (ostensibly under the Loan Agreement) and simultaneously the learned judge also made an order of sale of the Malay reservation land either by public auction or by private treaty, and that the proceeds of sale be utilized to pay the balance outstanding on the loan made to Ismail (which came to

RM300,000) notwithstanding the invalidity of the charge and order of sale decreed by His Lordship himself more than two years earlier, by his March 1988 order.

It was in these extraordinary circumstances whereby s. 66 of the Contracts Act was invoked by the respondent/chargee to impose liability on the appellants/chargors independently of the illegal third party charge that the appellants were forced to apply and had obtained from Mohd. Noor Abdullah J an order dated 22 September 1995 (the subject matter before the Court of Appeal) to set aside the October 1990 order, on the basis that they were entitled to the said remedy *ex debito justitiae*, without the need to comply with appeal procedure. Unfortunately, in setting aside the order of Mohd. Noor Abdullah, J the Court of Appeal, with respect, missed completely to appreciate the central argument on the availability of the inherent jurisdiction of the High Court to exercise its discretion to set aside what was obviously an illegal attempt by the respondent/chargee to subvert and effectively reverse the original March 1988 final and perfectly legitimate order of Mustapha Hussain, J as a special exception to the doctrine governing the finality of court orders notwithstanding the absence of any appeal. Relying principally on the principle laid down by Chang Min Tat, FJ (as he then was) in the Federal Court case of *Hock Hua Bank v. Sahari b. Murid* [1981] 1 MLJ 143, the reasoning of the Court of Appeal was purely on the basis that the High Court was *funcus officio* and so it concluded that Mohd. Noor Abdullah, J had no jurisdiction whatsoever to set aside the October 1990 order irrespective of any illegality in the said order. In the result, the learned judges of the Court of Appeal allowed the appeal of the respondent/chargee almost entirely on the ground of lack of jurisdiction, without having to consider the merits of the chargors' appeal, in particular on the validity of invoking s. 66 Contracts Act 1950 to the facts and circumstances of the case, which was the basis of the RM300,000 liability virtually imposed on the appellant/chargors by both parts of the October 1990 order.

It is of course settled law as laid down by the Federal Court in *Hock Hua Bank* case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence

of a category of orders of the court "... which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make.

The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure, "save that specifically it includes orders that have been obtained in breach of rules of natural justice". Similarly, in this country the statement of Abdoolcader J (as he then was) in *Eu Finance Berhad v. Lim Yoke Foo* [1982] 2 MLJ 37 @ 39 provides the correct guideline on the subject:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bells' Asbestos and Engineering Ltd*. [1967] 2 QB 729, 736 Lord Diplock LJ (now a Law Lord) said (at p. 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.

For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the Superior Courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened "any written law", the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases the normal appeal procedure should be adopted to set aside a defective order, unless the aggreived party could bring himself within the special exception.

In allowing the respondent/chargee's appeal, it is obvious from the judgment of the Court of Appeal that the learned judges had failed to direct their minds sufficiently or at all to the fundamental issue of whether the appellants' application before Mohd. Noor Abdullah, J came within the category of cases that attracts *ex debito justitiae.* It is apparent that this issue on inherent jurisdiction must be within the contemplation of this court, when allowing the appellants leave to appeal by order dated 16 April 1996, and also from the question of law framed, viz. "whether the order of Dato' Mustapha, J dated 21 March 1988 and 8 October 1990 (or part or parts thereof) are bad in law by reason of breach of the Malay Reservations Enactment 1933." It is plain that if the said orders were in violation of any of the statutory prohibitions in ss. 8(i), 13 or 17 of the Enactment which have their roots in the constitutional protection given to the Malays over reserve land created both before and after Merdeka, then it must necessarily follow that Mohd. Noor Abdullah, J should have the necessary inherent jurisdiction to set aside the entire October 1990 illegal orders on the basis of *ex debito jusititiae* principle. Such constitutional protection enshrined in art. 89 of the Federal Constitution and given effect by the Malay Reservations Enactment ought to be strictly applied and construed by the courts both in spirit and substance so as to give a meaningful and effective result both objectively and purposively to the intention of the supreme law of the Federation, and consequently the discretionary relief under s. 66 ought not in any event be exercised to compensate a wrongdoer. Having properly declared in the March 1988 order that the charge and the order of sale were null and void, it is unthinkable that in October 1990, the same judge could turn turtle by ordering the same land to be sold by public auction to satisfy a judgment arising out of the same illegal transaction purportedly under s. 66 of the Contracts Act. Clearly the 1990 order of sale of the reserve land which had the effect of an attachment in execution of a judgment was null and void being in violation of the prohibition imposed by s. 13 of the Malay Reservations Enactment which provides:

> No Malay holding shall be attached in execution of a decree or order of any court unless the suit or proceeding in which such decree or order was made was instituted before the commencement of this Enactment.

As adverted to earlier, it is also unfortunate that the Court of Appeal had denied itself of the opportunity to consider the appellants' complaint on the merits particularly in relation to the applicability of s. 66 to the facts and circumstances of this case, where the appellants/chargors were not privy to the Loan Agreement between the respondent and the borrower Ismail. Could Mustapha Hussain, J invoke the provision of s. 66 to order repayment at RM300,000 under the Loan Agreement which was still outstanding under the

loan given by the respondent to Ismail, and also to order the sale of the appellants' Malay reservation land by public auction to satisfy the RM300,000 judgment, notwithstanding his earlier final order declaring null and void the charge and the order of sale of the same reserve land? Obviously not. Clearly the real effect of the October 1990 order was to reverse the earlier March 1988 order between the same parties, under the guise of a claim for a remedy under s. 66, which provides:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to me person from whom he received it

It is necessary to bear in mind that s. 66 of the Contracts Act does not create a cause of action. It only confers a discretionary remedy in the nature of restitution to be exercised by the court within the ambit of the section and within the principles of the law of contract. First it must be borne in mind that the respondent/chargee had entered into two separate and distinct agreements with two different persons – the first with Ismail (the borrower) and the second with the appellants/chargors (the landowners) who in compliance with the requirement of the respondent gave a third party security for the loan by granting the respondent a registered charge over their Malay reservation land. From the Loan Agreement and the charge documents, the appellant/chargors were not a beneficiary of the loan. Neither Ismail nor the respondent was under any contractual obligation to give any part of the loan to the appellants, but there was evidence that Ismail did give some money from the disbursement of the loan to the appellants. In my view, since the appellants/chargors were not party to the Loan Agreement, s. 66 cannot be invoked against them. Under that section the party who is bound to restore any advantage received or to make compensation for such advantage should be construed as "any person" who is a party to the agreement and has received any advantage pursuant to the terms or conditions of the invalid contract, but not otherwise. To extend the meaning of "any person" in s. 66 to strangers to the agreement would be in violation of the elementary principle of contract. Since the Loan Agreement was strictly between the respondent and Ismail, the court had no jurisdiction to order the appellants to pay under s. 66 merely because he had received a fraction of the loan money from Ismail. The appellants were not a party to the Loan Agreement and as such there was no question of repayment by them either by way of restitution of benefit or compensation. As indicated earlier on s. 66 does not create a cause of action. It provides an equitable remedy which the court can order in favour of an innocent party against another party to an agreement who had received benefits

under it although the agreement is found unenforceable by law. In this case the appellants/chargors were not a party to the Loan Agreement. Their only role was to provide security for the loan, without any right to any money payable under the loan or the right to tell the respondent to whom or in what manner the loan should be disbursed. In accordance with the terms of the Loan Agreement the whole loan of RM400,000 was in fact disbursed on the sole instruction of Ismail, the borrower. The fact that Ismail had used the loan money received from the respondent to pay other people including the appellants could not make them parties or privies to the contract so as to enable the court to bring them within the ambit of s. 66. The principle of tracing in the law of trust should not be applied in ordinary relationship between a financier and its customer. It would be absurd for instance to hold that it part of the loan had been used to settle Ismail's grocery bills then the grocer could be ordered to restore the money to the respondent under s. 66. The truth of the matter is that only Ismail was a party and had received benefits under the Loan Agreement with the respondent. In any event, the Loan Agreement as distinct from the third party charge is perfectly valid and enforceable by law. Applying the principle of severability, the effect of the illegal charge was merely to downgrade the borrowing by Ismail from a secured to an unsecured loan. What was discovered to be void was the charge transaction between the appellants and the respondent, and as third party chargors, the appellants did not receive any "benefit" within the meaning of s. 66, either under the charge or the loan agreement. In the circumstances, the remedy ordered by Mustapha Hussain, J under s. 66 was invalid as it was made without or in excess of jurisdiction. Since the judgment under s. 66 was invalid, it follows that the order of sale of appellants' land to satisfy the said judgment must equally fall to the ground, apart from being in violation of the prohibition imposed by s. 13 of the Malay Reservations Enactment.

There could not be any dispute and indeed there was none in the courts below that the charge created by the respondent over appellants' Malay reservation land was void, being in contravention of the prohibition imposed by s. 8(i) of the Malay Reservation Enactment, as applicable to the State of Negeri Sembilan. Under that provision, it is expressly enacted that "... no Malay holding shall be transferred, charged or otherwise disposed of to any person not being a Malay, and no memorandum of transfer, charge or lease in contravention of this section shall be capable of registration in any Land Office or Registry of Titles" (except as provided in s. 8(ii), and ss. 16 and 17, none of which is applicable in the present case). The respondent could have come under s. 17 exception if at the relevant time the respondent company's name by virtue of a legal fiction, had been included and specified "a Malay" in the Second Schedule to the Enactment, but this was admittedly not the case due (according to the respondent) to an alleged administrative bungling.

To summarise, Mohd. Noor Abdullah, J was correct in law in exercising the inherent jurisdiction of the High Court to set aside *ex debito justitiae* the October 1990 order of Mustapha Hussain, J for the following reasons. The third party charge having been lawfully declared invalid by the High Court in 1988 by virtue of s. 8(i) of the Malay Reservations Enactment, the principal order made in 1990 for restitution of benefits or compensation against the appellants which in effect was an order to enforce an invalid third party security for repayment of loan purportedly decreed under s. 66 of the Contracts Act 1950 was made without or in excess of jurisdiction, and in consequence the order of sale of the appellant's land could not be sustained. Secondly, the sale order itself was in effect an order of execution to satisfy a judgment by the sale of the reservation land by public auction or private treaty (which should be construed in the circumstances as an order of attachment in execution of the said judgment) and therefore contravened the prohibition imposed by s. 13 of the Malay Reservations Enactment, a legislation especially permitted and protected by art. 89 of the Federal Constitution not only relating to reservation land existing before Merdeka Day, but also in respect of new reservation land.

If counsel in the court below had been more persuasive in the legal concept of *ex debito justitiae*, I would venture to say that the Court of Appeal would have concluded that Mohd. Noor Abdullah, J had the necessary jurisdiction to exercise his discretion to set aside the order of Mustapha Hussain, J dated 8 October 1990, and that the principle of *functus officio*, or *res judicata* could not in any way defeat the inherent jurisdiction of the court to do justice in this particular case.

For the above reasons, I was in agreement with the unanimous decision of this court in allowing the appeal, by setting aside the order of the Court of Appeal, and restoring the orders granted by Mohd. Noor Abdullah, J dated 22 September 1995. My learned brothers, His Lordship the Chief Justice and His Lordship Dato' Wan Adnan have read this judgment in draft and have indicated to me their agreement with the reasons contained herein for allowing the appeal.

Peh Swee Chin FCJ:

I have read all the written grounds of judgement since the conclusion of the hearing of the appeal when we allowed the appeal thereat with costs and set aside the order of the court below. It is my misfortune and sorrow as well that I have been unable to agree with such grounds or reasoning and perforce with the greatest respect I have to give my point of view to which I have also committed myself in certain earlier judgements which I have delivered.

The appeal is the culmination of a chequered history of litigation between, on the one hand, the appellants, who were the registered owners and chargors of a piece of Malay reservation land and on the other hand, the respondent which was the chargee of the same as well as a finance company. Quite a number of orders of High Court in Seremban were made or involved, and it would only be necessary to set out in full three of the orders which were all extracted already at all material times. The appellants and respondent are hereafter called the landowners and the chargee respectively and the land is hereafter called the said land.

The litigation started with an order of sale of the said land made on 17 October 1986 by the Land Administrator of Tampin on the application by the chargee for money borrowed but unpaid and secured by a charge of the said land.

In subsequent originating summons No. 31-593 of 1986, on the application of the landowners, both the relevant charge and the said order of sale aforesaid were declared null and void, *inter alia*, on 21 March 1988 for contravening s. 8 of the Malay Reservation Enactment FMS Cap. 142 which prohibits charge etc. of any Malay Reservation land to a non-Malay, and which is hereafter called the said Enactment the order dated 21 March 1988 is set out below.

JUDGEMENT

UPON THE APPLICATION of the 1st and 2nd Applications by way of Originating Summons dated the 27th day of November 1986, coming on before the Court for Judgement this day in the presence of **ENCIK ZAINAL ABDUL RAHMAN** of Counsel for the 1st and 2nd Applicants and **ENCIK YEOH SIK KEE** of counsel for the 1st Respondent and in the presence of the 2nd Respondent **AND UPON HEARING** Counsel for the 1st Respondent as aforesaid **AND** the Honourable **MR JUSTICE MUSTAPHA HUSSAIN** having ordered that Judgement be entered accordingly **THIS COURT DOTH HEREBY DECLARE** that the Charge under Presentation No. 300-81 Vol. 6 Folio 85 registered at The Land Office, Tampin, over land EMR 315, Lot 342 Mukim Repah District of Tampin registered on the 12th October 1981 and charged by the 1st and 2nd Applicants in favour of the 1st Respondent be and hereby declared null and void **AND HIS COURT DOTH HEREBY FURTHER DECLARE** that the Order for sale made by the 2nd Respondent on the 17th day of October 1986 in relation to the said land be and is hereby declared null and void} **AND IT IS ORDERED** that the 2nd Respondent do delete and cancel the said charge from the Register Document of Title} **IT IS ALSO ORDERED** that the 1st and 2nd Applicants, shall jointly and or severally render full and proper restitution to the 1st respondent of all money and benefit received from the 1st Respondent of all money and benefit received from the 1st Respondent **AND IT IS ALSO ORDERED** that pending the

restitution as aforesaid the 1st and 2nd Applicants be and are hereby restrained from disposing and/or dealing in any manner whatsoever with the said land **AND IT IS ALSO ORDERED** that the parties be and are hereby at liberty to apply for directions in regard to the implementation of this Judgement **AND IT IS LASTLY ORDERED THAT** there shall be no order as to costs.

Dated the 21st day of March 1988

...

SENIOR ASSISTANT REGISTRAR
High Court, Malaya
Seremban

There was no appeal from the order dated 21 March 1988. On 8 October 1990, the chargee obtained a further order quantifying the sum owed by the landowners apparently in pursuance of the restitution mentioned in the above judgement, (and surprisingly), ordering the said land to be sold again by public auction for the chargee to repay itself the money so owed on the void charge. The order dated 8 October 1990 is hereafter called the said previous order and is set out below.

BEFORE THE HONOURABLE MR. JUSTICE MUSTAPHA HUSSAIN

HIGH COURT, SEREMBAN, NEGERI SEMBILAN

THE 8TH DAY OF OCTOBER 1990 IN CHAMBERS

Judgement

UPON THE APPLICATION of the 1st Respondent **AND UPON READING** the summons in Chambers dated 4th May 1989 A**ND UPON HEARING** Mr. S, Palakrishnan of counsel for the 1st Respondent and in the presence of Counsel for the Applicants **IT IS ORDERED** that a declaration that the Applicants have received advantage and/or benefits directly from the 1st Respondent **AND IT FURTHER ORDERED** that the Applicants do jointly and/or severally pay to the 1st Respondent the sum of $300,000.00 together with interest at 14% per annum on monthly rests from 31st March 1989 **AND ALTENATIVELY IT IS FURTHER ORDERED** that the property identified as Title No. EMR 315, Lot 342, Mukim Repah, Tampin, Negeri Sembilan be sold by public Auction and/or Private Treaty **AND IT IS FURTHER ORDERED** that the proceeds there from the utilised to pay the said sum of $300,000.00 and interest **AND IT IS LASTLY ORDERED** that the Applicants do pay cost.

Dated the 8th day of October, 1990.

... Signed ...
SENIOR ASSISTANT
REGISTRAR
HIGH COURT
SEREMBAN

The landowners appealed from the said previous order and the appeal was struck out (for being incompetent) for proceeding with the appeal without having obtained prior leave to appeal. Nothing further was heard of the appeal, though a few years later a new proceeding was launched by the landowners using the legal process as it were a game of chess, as it would become clear later.

The new proceeding was Originating Summons No. 24-110/1995, filed by the landowners. It was beard and an order was made on 22 September 1995; the order is set out below, and it is hereafter called the order directly concerned:

PERINTAH

SAMAN PEMULA INI setelah dipanggil untuk perbicaraan pada 31 haribulan Julai 1995 dengan kehadiran Encik V. Ganesalingam bagi pihak Plaintif-plaintif, Encik J.W. Appukuttan bagi pihak Defendan Pertama dan Yang Berbahagia Tuan Abdul Aziz bin Abdul Rahim, bagi pihak Defendan Kedua DAN KEMUDIAN DITANGGUHKAN kepada 22 haribulan September 1995 untuk keputusan dengan kehadiran Encik V. Ganesalingam bagi pihak Plaintif-plaintif, Encik J.W. Appukuttan bagi pihak Defendan Pertama dan Encik Abdul Karim bin Al Rahman Peguam Kanan Persekutuan bagi pihak Defendan Kedua MAKA ADALAH PADA HARI INI DIISTIHARKAN BAHAWA Perintah Mahkamah bertarikh 8hb Oktober 1990 (di bawah Saman Pemula No: 31-593-1986) di mana diperintahkan bahawa tanah Plaintif-Plaintif yang dipegang di bawah Hakmilik No: EMR 315 Lot 342, Mukim Repah, Daerah Tampin, dijual melalui lelongan awam atau private treaty, adalah tidak sah dan batal DAN SELANJUTNYA DIPERINTAHKAN BAHAWA Perintah bertarikh 8hb Oktober tersebut dimana diperintahkan bahawa tanah Plaintif-plaintif tersebut dijual melalui lelongan awam atau private treaty diketepikan DAN SELANJUTNYA DIPERINTAHKAN BAHAWA Defendan Pertama dan/atau agen-agen mereka dihalang daripada meneruskan perjualan dan pindahmilik dan atau melupuskan tanah Plaintif-Plaintif tersebut DAN SELANJUTNYA DIPERINTAHKAN BAHAWA Defendan Pertama menyerahkan kepada Plaintif-Plaintif salinan asal dokumen Hakmilik tanah Plaintif-Plaintif tersebut DAN AKHIRNYA DIPERINTAHKAN BAHAWA kos kepada Plaintif-Plaintif

Bertarikh pada 22 haribulan September 1995.

t.t. Othman bin Yusof

...

Timbalan Pendaftar
Mahkamah Tinggi
Seremban

The order directly concerned set aside that part of the said previous order as providing for the order of sale of the said land for the chargee to repay itself, and this order of sale is therein called hereafter, the second order of sale. The chargee appealed from this order directly concerned and the appeal was allowed by the Court of Appeal, on the ground that the said previous order dated 8 October 1990 (which had been perfected before the new originating summon was filed) could not be varied or altered except on appeal and further the slip rule (O. 20 r. 11 RHC) did not apply either. The Court of Appeal relied for support, substantially on the Federal Court case of *Hock Hua Bank v. Sahari bin Murid* [1981] 1 MLJ 143, and held that the High Court was *functus officio* with regard to the order directly concerned and was wrong in making it.

The effect of the Court of Appeal allowing the appeal was that the said previous order as set out above was restored (containing as it did the order of sale of the said land by public auction or private treaty), and the order directly concerned, however, was set aside.

The order directly concerned set aside the second order of sale which had directly contravened s. 13 of the said Enactment. I was of the view that the second order of sale should not in form be set aside as it would directly repudiate the relevant ratio in *Hock Hua Bank v. Sahari bin Murid*. Happily, the second order of sale could be allowed to remain but execution of it should be stayed permanently without a right of removal of such stay. It would virtually give the same effect as if the said order directly concerned were still extant. I will explain further my reasons for saying so by discussing a number of connected topics. Had a stay of execution not been possible, if I may say in passing, the second order of sale would have to remain as part and parcel of the said previous order of the court and being so would remain inviolate from any attempt to set it aside.

For completeness, s. 13 of the said Enactment provides: "No Malay holding shall be attached in execution of a decree or order unless the suit as proceeding in which such a decree order was made was established before the commencement of this Enactment."

The question that arose immediately for me were (a) whether the High Court could set aside its earlier order made and perfected about four years previously in a fresh subsequent proceeding (ie, O.S. 24-110/95) from the point of view of the perfection of the order and another point of view of *res judicata;* (b) whether illegality could be a ground for doing so when it could not do so by virtue of what is stated in (a) above.

The appeal against the order directly concerned was heard and allowed by the Court of Appeal on the ground of that point of view that the said previous order having been perfected previously, it could not be amended or altered relying on *Hock Hua Bank v. Sahari bin Murid* [1981] I MLJ 143, hence the appeal before the Federal Court.

Before dealing with the point on which the Court of Appeal relied, let me deal briefly first with the other point of view referred to by me earlier, that of *res judicata.* The doctrine of *res judicata* would apply and bar the making of the order directly concerned, because the said previous order had become the truth between the landowners and the chargee, and the order directly concerned would constitute a challenge to the truth or accuracy of the said previous order. It is true that the doctrine was not expressly argued or expressly relied on by the courts below.

However, the High Court ought to have also dismissed the fresh subsequent proceeding in which the order directly concerned was made by still exercising its inherent jurisdiction by relying on the said doctrine even though it was not pleaded by any of the parties, see *Superintendent of Pudu Prison v. Sim Kie Chon* [1986] 1 MLJ SC 494, 498; *Asian Commercial Finance (M) Bhd. v. Kawal Teliti Sdn. Bhd.* [1955] 3 MLJ 189, 202, FC and *Scotch Leasing Sdn. Bhd. v. Chee Pok Choy* [1977] 2 MLJ 105 FC.

Reverting to the point relied on by the Court of Appeal, that of the perfected order not being capable of being amended or altered except for certain exceptions as stated in *Hock Hua Bank supra,* a passage therefrom as quoted by the Court of Appeal is set out as follows:

> Clearly the court has no power under any application in the same action to alter, vary or set aside a judgement regularly obtained after it is drawn up receipt under the slip rule in O. 28 r. 11 of the Rules of Supreme Court 1957 (O. 20 r. 11 of the Rules of High Court 1980) so far as necessary to correct errors in expressing the intention of the court: *Re. St Nazarie Co., Kelsey v. Doune; Hession v. Jones,* unless it is a judgement by default or made in the absence of a party at the trial or hearing. But if a judgement or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to

inipeach the original judgement: *Hip Foong Hong c. Neotia & Co., & Jonesco v. Beard.* The hearing of the action will in a proper case be expedited: *Smith v. Peizer.*

When a judgement in High Court has been perfected in the manner described in the above passage, a party to the judgement generally and subject to the same passage, or any other written law, and apart from any appeal, cannot re-open the matter finalised in the judgement by seeking to alter it or amend it for the court would be *functus officio* by virtue of the ratio of *Hock Hua Bank v. Sahari bin Murid.* Once perfected, a judgement of the High Court is also entitled to the obedience and respect from the parties to it on the basis of a command from a superior Court of unlimited civil jurisdiction in the course of contentious litigation, see *Issac v. Robertson* [1985] AC 97; *Pembenaan KSY Sdn. Bhd. v. Lian Seng Properties Sdn. Bhd.* [1991] 1 MLJ 100. *Puah Bee Hong v. Pentadbir Tanah Daerah Wilayah Persekutuan* [1994] 2 MLJ 601. It is elementary that a superior court is not any inferior court or statutory tribunal, (such as a Land Administrator under the National Land Code as in *Eu Finance Bhd. v. Loke Yoke Fou* [1982] 2 MLJ 37). It is also long established that one can apply to set aside an order of a superior court only in direct proceedings filed for the very purpose of having it set aside or valid grounds, but without doing so, one cannot attack its invalidity laterally by raising an objection to its invalidity in any other proceedings, without filing proceedings for applying to have it set aside first.

When one wishes to file such proceedings to so set it aside, one must do so within the same proceedings or action in which the same order was obtained and not in a separate fresh proceeding or new action on any ground other than those mentioned in the quoted passage from *Hock Hua Bank v. Sahari bin Murid,* and as mentioned later in this judgement in connection with a consent judgement.

What has been sought or felt in the appeal was that on account of s. 13 of the said Enactment, that the said second order of sale of the said land should be done without. This however should not be achieved in form of setting it aside directly as it was part of the said previous order, for amputating the second order of sale of the said land in this matter would be contrary to the ratio of *Hock Hua Bank v. Sahari bin Murid supra.*

The *Hock Hua Bank* case, if I may say with respect, is a classic for its incontestable precedent-wise correctness, clarity and *untedious precis.* Its ratio was followed by Supreme Court in *Mui Bank Bhd. v. Cheam Kim Yu (Beh Sai Ming, Intervenor)* [1992] 2 MLJ 642 (SC); *Scotch Leasing Sdn. Bhd. v.*

Chee Pok Choy and Anor [1997] 2 MLJ 105 (SC); *Overseas Chinese Banking Corporation Ltd. v. Simcloma Realty Sdn. Bhd.* [1989] 1 MLJ 377; *Syarikat Marak Jaya Sdn. Bhd. v. Syarikat Masinda Sdn. Bhd* [1991] 2 MLJ 417. The English parentage of *Hock Hua Bank v. Sahari bin Murid* is *Ainsworth v. Wilding* [1896] 1 Ch. 673 which was approved and adopted in two Privy Council cases, viz. Firm of *R.M.K.R.M. v. Firm of M.R.M.V.L.* [1926] AC 761, and *Kinch v. Walcott* [1929] AC 482.

I now deal with illegality as a ground for setting aside a previously perfected order (ie, the said previous order) made in another action by filing a fresh action or proceeding out of time of an appeal against the said previous order. It will be remembered the second order of sale of the said land was set aside by all other members of the Federal Court on ground of illegality because of s. 13 of the said Enactment.

It is true that the Federal Court in *Hock Hua Bank v. Sahari bin Murid* did say that a judgement could be set aside or impeached in a subsequent fresh action on the ground that such judgement was obtained eg, by fraud. Would it follow that if fraud in obtaining a judgement is sufficient as a ground, a *fortiori*, illegality touching a judgement would also suffice similarly for setting it aside? My answer to this is negative. Now, the case of *Hock Hua Bank v. Sahari bin Murid* does not mention such a ground of illegality. It will be noted that the judgement in the cited case was not a consent judgement. Consent judgement or consent order can next be considered to find out if among the available and established grounds that obtain for the purpose of setting aside such consent judgement or consent order, the ground of illegality is among such grounds.

The grounds referred to for setting aside a consent order of a judgement by consent are grounds which basically relate to *consensus ad idem* or the free consent of parties to a binding agreement or contract. It is elementary that if it is proved that there are grounds which vitiate such free consent, the agreement is not binding. Now a consent order or a judgement by consent is undoubtedly based on an agreement of both parties where consent to the agreement must or should have been free in the first place. If the agreement upon which a consent order or judgement by consent is based, is vitiated by any ground recognized in equity as vitiating such free consent, such as fraud, mistake, total failure of consideration, (see *Huddesfield Banking Co. v. Henry Lister* [1895] 2 Ch. 273 and the cases cited therein), then such a perfected consent order or judgement by consent could be set aside in a fresh action filed for the purpose. Grounds which would vitiate such free consent should also include misrepresentation, coercion, and undue influence and other grounds in equity.

In a similar vein, s. 14 of our Contracts Act 1950 speaks of the same grounds which make the consent to an agreement unfree. Thus illegality of contract is not a ground for making such consent unfree, thus grounds for setting aside a consent order or judgement by consent also do not include illegality, also.

Illegality on the other hand, affects a contract mostly in the way in that it nullifies the consideration or object of a contract and is available as a defence to an action based upon such a contract, that is all.

If a party complains of an illegality in a contract eg, when the consideration or object of the agreement is forbidden by statute and therefore unlawful, he must plead it or the court itself takes judicial notice of it when the contract is *ex facie* illegal or evidence about it clearly emerges in court. All these presupposedly must take place and must have taken place either at the trial of the first instance, or in any direct appeal to a higher court therefrom as the case may be. The court if it did not deal with the illegality in any way aforesaid, would be *functus officio* and cannot take the point after a judgement is perfected, the point not being one of the exceptions covered by eg, the ratio of *Hock Hua Bank v. Sahari bin Murid*. Further a point of illegality could not be reserved by a litigant for future use without deploying it at the trial or in an appeal therefrom. A court, cannot outside the scope of such trial and such appeal therefrom, at any time thereafter take judicial notice of such point pleaded as an afterthought in a later action filed also as an afterthought. The doctrine of *res judicata,* it having been based *inter alia* also on the high policy of interest *rei publicae ut finis litium,* would prevent these afterthoughts, see *Asia Commercial Finance (M) Bhd. v. Kawal Teliti Sdn. Bhd.* [1995] 3 MLJ 189 and *Scotch Leasing Sdn. Bhd. (In receiverships) v. Chee Pok Choy and Anors, supra.*

Let me demonstrate my position by way of illustration by referring to the well-known Privy Council case of *Sajan Singh v. Sardara Ali* [1960] MLJ 52, being an appeal from Malaya. In that case, Sajan Singh, the registered owner of a lorry used for hire or reward covered by a haulage permit issued to his name, sold the lorry to Sardara Ali who thereafter carried on the business of running the lorry for hire or reward on his own account entirely using the haulage permit of Sajan Singh and keeping up the pretence that it was the business of Sajan Singh by paying income tax on profit from the lorry business in Sajan Singh's name. Both parties then fell out; Sajan Singh seized the lorry and Sardara Ali sued for and succeeded ultimately in recovering possession of the lorry. Sardara Ali had been the virtual assignee or transferee of the Sajan Singh's haulage permit and therefore, was involved in the illegality of contract as any transfer or assignment of a haulage permit was prohibited by the then

relevant road transport legislation. The Privy Council, per Lord Denning's judgement held that since the illegal contract was fully carried out, it was effective to pass the property in the lorry to Sardara Ali and the court had no power to confiscate the lorry for illegality stating: "Let the estate lie where it falls".

I would like to ask, with respect, a rhetorical question: "Could Sajan Singh, having lost his case, file a fresh action or proceeding in the High Court to set aside wholly or in part the judgement of court on the ground that the judgement was illegal by statute?"

Save for some special factor in this case which compelled me to part company with the Court of Appeal, the Court of Appeal was, with great respect, very properly relying on the *Hock Hua Bank v. Sahari bin Murid*.

Whatever the labels used, the second order of sale was in substance and in truth the same as the order of sale of the said land which was set aside by the same court in the same originating summons shortly before the said previous order was made, notwithstanding the additional bit of alternative method of sale by "private treaty" in addition to public auction. The same land was involved; there was the same purpose of the sale order for recovering the money due under the abortive charge. The second order of sale was a resuscitation of the order of sale of the said land under the thinnest disguise which the same court had set aside earlier by its judgement given on 21 March 1988 in the same originating summons. The resuscitation in my view had the effect of invalidating or subverting the said judgement dated 21 March 1988 given on account of the said section Enactment after hearing arguments and from which none of the parties had appealed.

In my view, with respect to all parties concerned, such resuscitation in these circumstances was an abuse of process of the kind for which this court ought not to fold its arms and do nothing about it.

I had considered and decided that the clear ratio in the *Hock Hua Bank* case ought, on no account, to be departed from for dealing with this most unsatisfactory situation even though we were persuaded to do so on the ground of illegality on the argument based on the said Enactment. In other words, the said previous order should not be reopened and heard again on merits vide the ratio of *Hock Hua Bank v. Sahari bin Murid* after it was perfected and also on the ground of *res judicata* in any event. The second order of sale had to be got rid of, but only if there was some other legal basis for doing so. There was happily such a basis as follows.

The said relevant part of the said previous order as comprising the second order of sale was treated by all parties in this appeal tacitly on the assumption that it was an order of execution thereby infringing the said s. 13 of the said Enactment. The assumption was entirely correct. It was an order of execution (which includes a writ of seizure and sale) stated unfortunately in the form of and as part of a court's order ie, the said previous order.

An order of execution is also a proceeding, and if necessary, the case of *Wright v. Redgrave* [1879] 11 Ch. D 24 is authority for it. The reason for saying so will become clear in a moment or two later. An order of execution may be carried out at the instance of a judgement creditor normally within six years after the date of order as judgement for payment of money and thereafter leave would be required for so carrying it out after the six years' period. The second originating summons, in which the said order presently concerned was made, was filed well within the six years from the date of the said previous order. Any judgement debtor if dissatisfied could have been entitled to file similarly an application within such time frame to set aside or stay any order of execution or writ of seizure and sale. The court which makes an order since perfected is *functus officio* about re-opening the matter and rehearing the parties on merits about the order, but it is not *functus officio* to hear a subsequent application to set aside an order of execution or order of seizure and sale.

Normally, the landowners would have been perfectly in order to set aside such an order of execution but for the fact that the said order of execution which was made was part of a perfected court's order, ie, of the said previous order. But if the court could not grant an order outright in the form of setting aside the said order of execution because it was part of a perfected order and also because it was *res judicata,* then the court could still otherwise grant a relief or order which could be consistent with any prayer sought by the second originating summons, see the case of *Khaw Poh Chhuan v. Ng Gaik Peng and Ors* [1966] MLJ 761 at p. 785. The court could therefore grant a stay of the said order of execution – a relief consistent with the prayer of the second originating summons if the court had the inherent jurisdiction to do so.

On the question of such inherent jurisdiction, first there is the inherent jurisdiction to stay any proceeding, (which includes an order of execution), which is an abuse of process; see for instance *Metropolitan Bank v. Pooley* [1885] 10 App. Cas. 210; *Lawrence v. Lord Norreys* [1890] 15 App. Cas. 210 and in the letter, Lord Herschell said it ought to be sparingly exercised and only in very exceptional cases. Lord Blackburn in *Metropolitan Bank, supra*, said that on the other hand, a stay or even dismissal of proceeding may "often

be required by the very essence of justice to be done." Thus the inherent jurisdiction to stay any proceeding which is an abuse of process exists undoubtedly. Was the second order of sale ie, the order of execution an abuse of process? It was for the resuscitation of the earlier order of sale for reasons stated earlier was a misuse of court's machinery and was therefore an abuse of process. I therefore decided that the relevant part of the said previous order ie, the second order of sale ought be stayed permanently.

My decision would appear however to be unusual and could even give rise to some misgiving about the propriety about such consequential order not made by other members of the court. This court however, or any member of this court could make any additional consequential order and if any precedent is ever required, one can draw a parallel between such further consequential order of mine and the case of *Daimler Company Ltd. v. Continental Tyre and Rubber Company (Great Britain) Ltd.* [1916] 2 AC 307.

In that case, in answer to an application for summary judgement under O. 14 the defendants, *inter alia*, alleged that the action was commenced without the authority of the plaintiff. The Master disagreed and granted such summary judgement. The Master's order was confirmed on appeal by the judge in chambers and further by Court of Appeal. On further appeal to the House of Lords, the Law Lords were unanimous that the appeal should be allowed on the ground of so commencing action without authority. Earl of Halsbury alone held (merely) that appeal should be allowed. That would have meant by necessary implication, that the summary judgement was set aside and unconditional leave to defend was granted. Lord Parker, in allowing the appeal, appears to make a different consequential order in exercising of an inherent jurisdiction to curb an abuse of process by ordering further that the whole action be struck out and all orders therein discharged. Viscount Mersey, Lord Kinnear, Lord Atkinson, Lord Shaw and Lord Parmoor all agreed to the order proposed by Lord Parker. Lord Parker's proposal of course, carried the day.

I therefore also allowed the appeal with costs and set aside the order of the Court of Appeal below, making a further order that the said order directly concerned be substituted with another order to the effect that execution of the second order of sale contained in the said previous order be stayed permanently without any right of removal of such stay.

Gopal Sri Ram JCA:

This appeal raises a short but important point of principle. It has to do with the scope and extent of the protection given by the Malay Reservation Enactment ('the Enactment'). The matter arose in this way.

The appellants are the registered proprietors of all that land held under EMR 315, for Lot No. 342 in the Mukim of Repah Tampin, Negeri Sembilan ('the said land'). They entered into a joint venture agreement with one Ismail bin Omar for the purpose of developing the said land into a housing estate.

Ismail was in need of funds. The appellants were prepared to assist him. They charged the said land to the respondent to secure a loan advanced to Ismail. The charge was duly registered. There was an annexure to the charge, cl. 1(1) of which reads as follows:

> 1. In consideration of the Chargee having agreed to lend to Ismail bin Omar (hereinafter called the 'Borrower') an amount of Dollars Four Hundred Thousand (M$400,000) only the Chargors undertake that he will pay on demand to the Chargee:-
>
> (1) the said sum of Dollars Four Hundred Thousand (M$400,000) only (hereinafter referred to 'the Loan' which expression shall include wherever the context so permits any balance or part thereof) together with interest thereon at the rate of Fourteen per centum (14%) per annum on yearly rest (hereinafter referred to as the 'Prescribed Rate' which expression shall include where and when applicable such other rate as may from time to time be substituted therefor in the manner hereinafter provided) AND until demand as aforesaid to ensure that the Borrower repay the Loan and interest thereon at the Prescribed Rate within Thirty Six (36) calendar months (hereinafter referred to as the 'Repayment Period') from the date following part or full disbursement of the Loan or advanced or paid to on behalf or for the benefit of the Chargors (or on such other date as the Chargee may stipulate).

Such a charge as was created by the appellants in favour of the respondents is called a third party charge because the chargee is not the borrower but a third party. The chargor's security is liable to foreclosure only when the borrower makes default on the principal contract he has with the lender. It is akin to a secured guarantee, but with important differences. See, *Low Lee Lian v. Ban Hin Lee Bank Bhd.* [1997] 1 MLJ 77; NKM *Properties Sdn. Bhd. v. Rakyat First Merchant Bankers Bhd.* [1986] 1 MLJ 44.

In the present case the appellants, as chargors, agreed to pay to the respondent, on demand, the loan made to Ismail and interest thereon. They also agreed to ensure that Ismail would pay the loan and interest within thirty-six months. If Ismail defaulted, they would, on demand being made on them, be liable to make payment. In my judgment, the appellants were, according to the language of the annexure read as a whole, in the position of secured guarantors.

The respondent, on the strength of the appellants' charge; lent RM400,000 to Ismail. It is common ground between the parties that the respondent disbursed no part of this sum to the appellants. It was, however, established that the appellants received from Ismail part of the loan he obtained from the respondent. But this fact is neither here nor there. Once the respondent disbursed the loan to Ismail, the money was his and it was up to him what he chose to do with it. And the fact that he paid over to the appellants, part of the loan he had obtained from the respondent did not make the appellants parties to the original contract of loan that Ismail had with the respondent. For, there were two separate and distinct contracts. The first was the contract of loan between Ismail and the respondent. The second was the contract between the appellants and the respondent contained in the annexure to the charge. The importance of this aspect of the case may be seen later in this judgment.

At the date of the creation of the charge, the respondent had not been included in the Schedule to the Enactment. It was not, therefore, a Malay for the purposes of the Enactment. The charge was consequently a dealing prohibited by the Enactment. In accordance with a long line of uncontroverted authority it was illegal and utterly void. See, *Haji Hamid bin Ariffin & Anor v. Ahmad bin Mahmud* [1976] 2 MLJ 79.

Ismail did not repay the loan in full. There was RM300,000 still owing to the respondent. The respondent wanted to recover this sum and outstanding interest. It therefore enforced the charge. Because the said land was held under a Mukim Register, the respondent went before the Land Administrator and obtained an order for sale. The appellants then applied to the High Court at Seremban for a declaration that the charge as well as the order for sale made by the Land Administrator were invalid. On 21 March 1988 the High Court granted the declarations sought and, as a consequential measure, directed the cancellation of the charge in question. Had matters rested there, no difficulty would have arisen.

But the judge who heard the cause went further. He acted upon the respondent's summons filed in the same proceedings and made an order, *inter alia*, directing the appellants to repay all monies lent to Ismail. For convenience I shall refer to this as "the first order".

On 8 October 1990, the learned judge made another order ('the second order") whereby he granted a declaration that the appellants had received an advantage or benefit directly from the respondent. He also ordered that the said land be sold by public auction or by private treaty and that the proceeds of the sale be used to pay the balance outstanding on the loan made to Ismail. The instant appellants were dissatisfied with this decision. They appealed against it to the Supreme Court. But their appeal was dismissed because it was procedurally defective.

The appellants then commenced proceedings afresh to have the order of 8 October 1990 declared null and void and to have it set aside on the ground that it contravened s. 13 of the Enactment. The matter came before Mohd. Noor Abdullah J. He was not the judge who had made the earlier orders. After hearing argument, he granted the declaration sought and set aside the impugned order. The respondent then appealed to the Court of Appeal (Shaik Daud, NH Chan, Abu Mansor JJCA) which allowed the appeal. The appellants then moved this court for leave to appeal. This court granted leave limited to only one issue, namely whether the first and second orders or any part thereof are invalid because they were made in contravention of ss. 13 and 17 of the Enactment.

So much for the factual background.

In the proceedings before Mohd. Noor Abdullah J, the respondent argued that *res judicata* and estoppel precluded the appellants from questioning the validity of the second order. The learned judge, however, rejected this argument principally on the ground that it would be unjust to estop the appellants from challenging the second order by reference to *res judicata* or any other branch of the doctrine of estoppel because the impugned order was plainly invalid: it having been made in contravention of an express provision of written law.

The Court of Appeal, without considering the merits of the reasoning advanced by the learned judge, reversed him on the sole ground that the High Court was *functus officio* and had no power to re-open the matter. Shaik Daud JCA (with whom the other members of the court agreed), when delivering the leading judgment of the court said:

a It is settled law that one High Court cannot set aside a final order of another High Court, let alone its own final order. It is our view that the Seremban High Court having rightly or wrongly given 8 October 1990 order, is *functus officio,* and it cannot set its own order aside. In *Hock Hua Bank Bhd. v. Sahari bin Munid* [1981] 1 MLJ 143, the learned judge had made an order for sale in a foreclosure proceeding. The order was made after hearing all the parties b and was made despite a claim of *non est factum* and allegations of fraud and forgery by the respondent. There was no appeal against that order. The respondent applied to set aside the judgment which at first was refused but on a second application it was allowed. On appeal the then Federal Court held that the learned judge was *functus officio.* At p. 144 of the judgment Chang c Min Tat FJ (as he then was) who delivered the judgment held:

> Clearly the Court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it is drawn up, except under the slip rule in O. 28 r. 11 Rules of the Supreme Court 1957 (O. 20 r. 11 Rules of the High Court 1980) so far as necessary to correct errors in expressing the intention of the Court. d

Clearly the order of 8 October 1990 is a final order of the Seremban High Court. Therefore that order cannot be altered varied or set aside by the same court even though presided over by another judge. Nor does it come under the provision of O. 20 r. 11 of the Rules of the High Court 1980. The only recourse is to appeal to a higher court which has jurisdiction to pronounce the e validity or otherwise of 8 October 1990 order. Therefore we feel that with respect Dato' Mohd. Noor b. Haji Abdullah J ought not to have entertained the respondent's application.

The view expressed by the Court of Appeal makes it necessary and desirable, f before going into the merits of the argument advanced in favour of striking down the first and second orders, to address and determine the jurisdictional question. If, as held by that court, there is no power in a court to set aside its orders, though made in contravention of the express provisions of a statute, then, I must fold my arms in abject submission, allow the orders to stand and let the illegality persist. But I do not perceive the law to intend such a result. g

It is true, as a general rule, that orders of a court of unlimited jurisdiction may not be impugned on the ground that they are void in the sense that they may be ignored or disobeyed. The decision of the Judicial Committee of the Privy Council in *Isaacs v. Robertson* [1985] AC 97 affirms the existence of h the rule. There, Lord Diplock when delivering the advice of the Board said:

> Their Lordships would, however, take this opportunity to point out that in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are 'void' in the sense that they can be ignored with impunity by those persons to whom they are addressed, and i

orders that are 'voidable' and may be enforced unless and until they are set aside. Dicta that refer to the possibility of there being such a distinction between orders to which the descriptions 'void' and 'voidable' respectively have been applied can be found in the opinions given by the Judicial Committee of the Privy Council in the appeals *Marsh v. Marsh* [1945] AC 271 at p. 284 and *MacFoy v. United Africa Co Ltd.* [1962] AC 152 at p. 160; but in neither of those appeals nor in any other case to which counsel has been able to refer their Lordships has any order of a court of unlimited jurisdiction been held to fall into a category of court orders that can simply be ignored because they are void *ipso facto* without there being any need for proceedings to have them set aside. The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind; what they do support is the quite different proposition that there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts *ex debito justitiae* the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice.

The contrasting legal concepts of voidnesss and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular, it can be set aside by the court that made it upon application to that court; if it is regular, it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies.

It is one thing to say that an order of a court of unlimited jurisdiction must be obeyed until it is set aside. It is quite a different thing to say that a court of unlimited jurisdiction may make orders in breach of written law. *Isaacs v. Robertson* is certainly not authority for the latter proposition. I take it to be well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, **upon the illegality being clearly shown,** to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.

As Abdoolcader J observed when delivering the judgment of the former Federal Court in *Eu Finance Berhad v. Lim Yoke Foo* [1982] 2 MLJ 37, 39:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729, Lord Diplock LJ (now a Law Lord) said (at p. 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.

There are several authorities that deal with the validity of orders made in excess of jurisdiction by a court of unlimited jurisdiction and I find it sufficient to refer to two of them. The first is the decision of the Privy Council in *Meenakshi Naidoo v. Subramaniya Sastri* LR 14 IA 160 which concerned a case where the High Court at Madras purported to entertain an appeal against the decision of a District Judge which was not appealable. At the hearing before the High Court, neither the parties nor the court raised the question of jurisdiction. The High Court then reversed the District Judge. On appeal to the Privy Council it was held that consent or waiver could not cure the absence of jurisdiction. Sir Richard Baggallay, when delivering the advice of the Board said (at p. 166):

> It has been suggested, and it is not right altogether to pass that suggestion over, that, by reason of the course pursued by the present appellants in the High Court, they have waived the right which they might otherwise have had to raise the question of want of jurisdiction. But this view appears to their Lordships to be untenable. No amount of consent under such circumstances could confer jurisdiction where no jurisdiction exists. Upon this point it may be convenient to refer to the judgment of their Lordships delivered by Lord Watson in the comparatively recent case of *Ledgard v. Bull* LR 13 IA 144, as it in very concise terms deals with the circumstances under which there can be a waiver of a right to complain of a want of jurisdiction. Their Lordships say: 'The defendant pleads that there was no jurisdiction in respect that the suit was instituted before a court incompetent to entertain it; and that the order of transference was also incompetently made. The District Judge was perfectly competent to entertain and try the suit if it were competently brought; and their Lordships do not doubt that in such a case a defendant may be barred by his own conduct from objecting to irregularities in the institution of the suit. When the judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process, although they may constitute the judge their arbitrator, and be bound by his decision on the merits when these are submitted to him. But there are numerous

> authorities which establish that when, in a cause which the judge is competent to try, the parties without objection join issue, and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit. In the present case there was an inherent incompetency in the High Court to deal with the question brought before it, and no consent could have conferred upon the High Court that jurisdiction which it never possessed.

The second authority is *Chief Kofi Forfie v. Barima Kwabena Seifah* of which there is a note in [1958] 1 All ER 289. It is also a decision of the Judicial Committee, on an appeal from Ghana. Mr. L.M.D. De Silva when delivering the advice of the board is reported to have said (at p. 290) as follows:

> A court had inherent power to set aside a judgment which it had delivered without jurisdiction. Lord Greene, MR, in *Craig v. Kanssen* [1943] 1 All ER 108 at p. 113), after referring to several decisions, had said:
>
> > Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled *ex debito justitiae* to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary.
>
> Their Lordships were of the same opinion. Assuming that the judge had no power on 29 June 1949, to review his judgment of 10 May 1949, he nevertheless had power to declare it a nullity and proceed to give a fresh judgment. This, in fact, he had done, and the only criticism of the proceedings of 29 June that could be made was that, on a question of procedure, he attributed the authority to do the thing he did to a source from which it did not flow. But, although the source named was, on the assumption made, incorrect, he undoubtedly had power to do the thing he had done. No other error could be said to have been committed. Such an error did not, in their Lordships' opinion, vitiate the act done. It followed that the judgment of 29 June 1949, was not a nullity.

I must pause now to mention the decision of the Supreme Court in *Scotch Leasing Sdn. Bhd. v. Chee Pok Choy & Ors* [1997] 2 MLJ 105. In that case, the respondent, the registered proprietor of land held under Land Office title, created a charge over it in the appellant's favour. The appellant commenced proceedings by originating summons in the High Court for an order for sale of the land in question. The High Court heard the summons *inter partes* and granted the appellant an order for sale. That order was perfected. Now, ss. 260 to 263 of the National Land Code 1965 confer exclusive jurisdiction upon

a Land Administrator to make an order for sale of any land held under Land Office title. So, in truth, the High Court had no jurisdiction to make the order in question. The respondent did not, however, take the point during the hearing of the appellant's summons. Some nine months later, the respondent applied to set aside the order for sale on the ground that the High Court plainly lacked jurisdiction. The judge agreed with jurisdictional argument and set aside his earlier order. On appeal, the Supreme Court reversed his decision, observing, *inter alia*, as follows (at p. 110):

> To allow the learned judge in the court below to reopen the matter nine months after it was decided by himself (and for that matter, any other judge), a court would have to allow, equally, another judge exercising a co-ordinate jurisdiction to set it aside on the same jurisdiction point after, say, 20 years, in the same case, for food for a goose is also food for a gander. This would bring absolute chaos to our judicial system which does not carry on in such fanciful way as contended by learned counsel for the chargors.
>
> Such chaotic condition is prevented by several things.
>
> First, a jurisdiction point is no less an issue than other issues in civil litigation. If not raised at the hearing in the court of first instance or on appeal, it cannot be raised thereafter, for the doctrine of *res judicata* sets in.
>
> *Res judicata* has been explained before, eg see *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 (SC).
>
> When the jurisdiction point in question was not raised before the learned judge before he made the first order, when he heard the matter *inter parties*, or at any rate, if it was not raised for review before the said order was perfected, the requirements of a proceeding in an adversarial system were complied with and satisfied, unless the learned judge exceptionally took the jurisdiction point on his own initiative, if he so minded, before the said order of sale was made. We mentioned the adversarial system because in it, a court generally would leave it to the parties in litigation to conduct their respective cases as best as they could without interference.
>
> It is to be remembered in this connection that a superior court like the High Court is 'a court of unlimited jurisdiction in the course of contentious litigation' as stated by Lord Diplock in *Isaacs v. Robertson* [1984] 3 All LR 140 at p. 143, when referring to a High Court as such a court in connection with the requirement that a High Courts order must be obeyed and could only be challenged in a direct application to set it aside. This was followed by the Supreme Court in *Puah Bee Hong Anor v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur Anor (Teo Keng Tuan Robert, Intervener) and Another Appeal* [1994] 2 MLJ 601 (SC).

> We may add that under s. 114(e) of the Evidence Act 1950, one can presume that the High Court has such attributed jurisdiction unless rebutted. We say this in connection with our description of such a jurisdiction point as being ordinarily an issue in litigation.
>
> If the learned judge had no jurisdiction on 17 September 1992 to hear the application dated 8 June 1992 to set aside the first order, the application to set aside could not have been entertained by the court in the first place. Thus, any legal argument in support of such application to set aside – should it proceed – *ex necessitate* could not have been entertainable, lying, as it did, outside the threshold of the court.
>
> As a necessary consequence, this appeal is not properly before us – it being an appeal from an order made at a hearing which was an exercise in futility.

I am, with respect, unable to agree with this observation since it conflicts with well-settled principles enunciated in the two Privy Council cases earlier cited. It is therefore my very respectful view that the decision in *Scotch Leasing* is wrong.

It is therefore clear, in light of the principles established by high authority, that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law. The ends of justice will not be met if such a power did not exist. And the procedural branch of the broad and flexible doctrine of estoppel known as *res judicata* finds no place in such a circumstance. Neither has the *functus officio* theory, which, upon close examination is merely part and parcel of the doctrine of *res judicata,* any role to play in the case.

It follows from what I have said thus far upon the topic under discussion that Mohd. Noor Abdullah J had ample power and jurisdiction to grant the declaration in question and to set aside the order made by his predecessor. The Court of Appeal therefore fell into error by declining to enter upon the merits of the case and in deciding the appeal before it entirely on the ground that the High Court was *functus officio.*

Having decided that the High Court had the requisite jurisdiction to set aside the second order, the issue in respect of which this court granted leave may be dealt with. The question is whether the first and second orders were validly made, in particular having regard to the relevant provisions of the Enactment.

Taking the first order, it may be recalled that it, *inter alia*, directed the appellants to repay the outstanding loan and interest due from Ismail to the respondent. This part of the first order is connected with so much of the second order that declared the appellants to have received benefits under the contract of loan that Ismail had with the respondent.

In making these orders of restitution, the judge relied on s. 66 of the Contracts Act 1950, which reads as follows:

> 66. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

The respondent, in support of its summons before the High Court, had argued that the appellants, though not parties to the contract of loan between itself and Ismail, and though not having received any part of the loan amount, had nevertheless received an advantage under that contract and were therefore obliged to disgorge it. It was contended that the phrase "any person" appearing in s. 66 was wide enough to bring within its ambit persons who were not parties to the void agreement to which the section refers.

In support of this argument, the respondent relied on two authorities decided under the equipollent Indian provision, namely, s. 65 of the Indian Contract Act 1872. They are *Giraj Baksh v. Kazi Hamid Ali* [1886] ILR 9 All 340 and *Devi Prasad v. Mehdi Hasan* AIR [1940] Pat. 81. These decisions certainly appear to support the respondent's submission. However, there is at least one decision that goes the other way. See, *Gendsingh v. Gowardhan* AIR [1938] Nag. 451.

Before entering upon a discussion of the Indian cases, I pause to mention a point of much importance that must be appreciated. It is this. What became void in consequence of a breach of the Enactment was the charge that the appellants had created over the said land. With it fell the annexure that contained the contract between the appellants and the respondent. The contract of loan between Ismail and the respondent continued to be perfectly valid since it did not offend the provisions of the Enactment. But, no benefit whatsoever passed from the respondent to the appellants under either contract. The appellants were not parties to the loan agreement. Neither did they receive any benefit under the annexure to the charge. Indeed, what they suffered was a detriment because they put their property at risk. The benefit of which s. 66 speaks is one that is received under the very contract which, to quote the words of the section, "is discovered to be void" or "becomes void". The benefit in question, namely the sum of RM400,000 passed from the respondent to Ismail under the contract of loan which neither became void nor was discovered to be void. Section 66 did not come into play insofar as **that** contract is concerned. With regard to the contract that was discovered to be void, namely, the annexure to the charge, the appellants did not, as I earlier observed, receive any benefit under it. Nevertheless, the respondent sought to

extend the reach of section by contending that since the appellants had received a part of the loan sum from Ismail, they came within the phrase "any person" and were therefore under an obligation to make restitution.

With that, I now turn to a consideration of the Indian cases relied upon by the respondent.

A careful reading of the Indian cases makes it apparent that the difference of opinion between the High Courts of India on the interpretation of their s. 65 gravitates around the doctrine of privity of contract. It may be traced to the view taken by some of the Indian High Courts that s. 2(d) of the Indian Contract Act 1872 did away with that doctrine. That subsection, which is in terms identical to the similarly numbered section in our Contracts Act 1950, reads as follows:

> (d) when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;

The notion that s. 2(d) had the effect of abolishing doctrine of privity of contract was exploded by the decision of the Privy Council in *Kepong Prospecting Ltd. & Ors v. Schmidt* [1968] 1 MLJ 170. The Board there held that our law does not recognise a *jus quaesitum tertio* arising by way of contract. The concatenation of Indian cases giving rise to a conflict of opinion on the subject was referred to in the advice of the Board, which on that occasion was delivered by Lord Wilberforce. He said (at p. 174):

> Their Lordships were not referred to any statutory provision by virtue of which it could be said that the Malaysian law as to contracts differs in so important a respect from English law. It is true that s. 2(d) of the Contracts (Malay States) Ordinance gives a wider definition of 'consideration' than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties, and it was not possible to point to any other provision having this effect. On the contrary paras (a), (b), (c) and (e) support the English conception of a contract as an agreement on which only the parties to it can sue.

Kepong Prospecting is therefore authority for the proposition that the words "or any other person" appearing in s. 2(d) of the Contracts Act 1950 are not to be wide enough to exclude the doctrine of privity of contract. It follows, by parallel reasoning, that the identical words used by s. 66 do not include persons who are not parties to a contract under which a benefit passed. In my judgment, there is no justification, in principle or policy, to extend the

terms of the section by means of an interpretation that runs counter to settled jurisprudence. It follows that the only parties to a contract may claim or become liable to make, restitution under that section. Any other construction would produce an anomaly because, while only parties to a contract may sue upon it, yet, when the very same contract is discovered to be void, anyone, including persons who cannot enforce it may recover any benefit received by one of the parties thereto.

Accordingly, in my judgment, the words "any person" appearing in s. 66 must refer only to parties to the original contract that either becomes or is discovered to be void. The Indian cases of *Giraj Baksh* and *Devi Prasad* relied upon by the respondent in the High Court were not correctly decided and do not represent our law.

Consequently, it is difficult to justify so much of the first and second orders that make the appellants liable to repay the loan taken by Ismail from the respondent. As I earlier observed, it was Ismail who received all the money from the respondent. The appellants had none of it, save from Ismail himself. There was therefore no legal basis to pray in aid s. 66 of the Contracts Act in order to impose liability upon which the appellants to make restitution.

Although these arguments were not raised in the appeal, the point at hand is so fundamental to the case that it would be unjust to let the matter pass without comment. Further, the order of this court granting leave does throw open, albeit to a limited extent, the validity of the first order and the opportunity thus presented should be seized to clarify the position lest it be thought that the law permits a wider reach in cases under s. 66 than is really the case.

Apart from the point made on the applicability of s. 66 to the facts of the case, the first order does not in any way infringe the provisions of the Enactment. In other words, there is nothing in the Enactment that prohibits the making of an order for restitution of monies advanced upon the strength of a void security. All that remains for consideration is the validity of so much of the second order as directed a sale of the said land.

That no land to which the Enactment applies may be sold in execution of a judgment is made plain by s. 13, which reads as follow:

> No Malay holding shall be attached in execution of a decree or order of any court unless the suit or proceeding in which such decree or order was made was instituted before the commencement of this Enactment.

Counsel for the respondent meets the prohibition housed in the section by arguing that there was no attachment in execution of a decree in the present case. The respondent was merely seeking relief in equity, a proceeding that falls outside the section.

As to what is meant by "execution", counsel referred to the judgment of Lord Denning MR in *Re Overseas Aviation Engineering (G.B.) Ltd* [1962] 3 All ER 12. The Master of Rolls there said that "execution".

> means, quite simply, the process for enforcing or giving effect to the judgment of the court: and it is 'completed' when the judgment creditor gets the money or other thing awarded to him by the judgment.

Counsel also relied on the following passage from the judgment of Bowen LJ in *Re Shephard* 43 Ch. D. 131, 137:

> Equitable execution is not like legal execution; it is equitable relief, which the court gives because execution at law cannot be had. It is not execution, but a substitute for execution.

With respect, the argument of counsel is without merit. And the authorities he has cited do not assist him. The proper approach is to look at substance and not mere labels. In substance the respondent was seeking to effect a sale of the said land for the purpose of satisfying a judgment in its favour. What Parliament has sought to achieve by means of s. 13 is to put Malay reservation land out of the process of execution. If counsel were correct in his argument, a creditor could obtain by indirect means that which he cannot directly obtain and thus thwart legislative intent. It is accordingly clear that the phrase "attached in execution" in s. 13 refers to every mode of execution, including equitable execution.

The second order, in so far as it directs the sale of the said land, was made in contravention of s. 13. As there is no power in a court to make an order in breach of the provisions of written law, the second order was illegal and utterly void. Mohd. Noor Abdullah J was entirely right in acceding to the appellants' application to have the second order set aside. The Court of Appeal was wrong in deciding the appeal to it purely on the basis that the judge was *functus officio*. It ought to have entered upon the merits of the case. Had it done so, it would have concluded that the second order was illegal and utterly void.

To summarise, the respondent is not entitled to pray in aid the court's process of execution to recover from the appellants, any part of the money it lent to Ismail for two reasons.

(1) The appellants received no benefit under the contract that was discovered to be void and they were not parties to the contract under which the benefit did pass;

(2) The enforcement of the restitution order by means of a sale of the said land would contravene the express prohibition in the Enactment against such an exercise.

It is for these reasons that I came to the conclusion that the appeal should be allowed with costs both here and in the court below. The order of the Court of Appeal was set aside and the orders made by the judge at first instance were restored. The deposit paid in respect of the appeal to the Court of Appeal was ordered to be paid out to the appellants in satisfaction of their costs in that court. The deposit paid into court in respect of this appeal was ordered to be refunded to the appellants.